



STATE OF WASHINGTON

DEPARTMENT OF AGRICULTURE

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March 10, 2003

U.S. Environmental Protection Agency  
OPP Public Regulatory Docket (7502C)  
Docket for Comments on the Advance Notice for Proposed Rulemaking: Counterpart  
Regulations for the Endangered Species Act  
Docket ID Number OPP-2003-0010  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
WDC, 20460

To Whom It May Concern:

The Washington State Department of Agriculture (WSDA) would like to thank EPA for the opportunity to comment on the Advance Notice of Proposed Rulemaking to promulgate counterpart regulations under the Endangered Species Act (ESA) described in the Federal Register Notice (FRN), published January 24, 2003 (Volume 68, Number 16).

The Washington State Department of Agriculture is the State Lead Agency for pesticide registrations in Washington.

WSDA wishes to applaud the cooperative effort undertaken by the US Environmental Protection Agency (EPA), US Fish and Wildlife Service (FWS), NOAA Fisheries, and the US Department of Agriculture to develop counterpart regulations. We believe that only by working in a cooperative manor can EPA and the Services resolve the daunting task of assessing the impact of pesticides on endangered species. In general, WSDA agrees with the process set forth in ANPR. In particular, we wish to comment on the following: Enforcement, Modification to EPA's approach for risk assessment, data quality, the role of State Lead Agencies, and ESA review for Emergency Exemptions and Special Local Needs Registrations.

## Specific Comments:

### *Enforcement*

- Enforcement should be through FIFRA, and not the ESA. Applicators who follow pesticide labels, including endangered species information, who might accidentally harm a listed species through no fault of their own, should not be liable for violation of any law. WSDA has always informed applicators that the pesticide label provided to them results in the safe use of the product. It is important that pesticide users not be punished for any unintended and accidental consequences resulting from lawful pesticide use. Ensuring legal pesticide applications do not harm listed species is EPA's responsibility, not the applicators. Any enforcement should therefore be through FIFRA, and not through the ESA.
- EPA described in a previous FR notice (December 2, 2002) a mechanism to modify pesticide labels to notify pesticide applicators that county-specific bulletins will be used to describe additional measures to protect listed species, if needed. WSDA strongly supports this county-specific mechanism, which as described, is FIFRA enforceable.

### *Modification to EPA's Approach to Assessing Risk to Listed Species.*

- It is unclear from the FR notice if EPA uses the methodologies outlined in the 1998 Guidelines for Ecological Risk Assessment. In the notice it is stated that EPA follows the principles contained in these guidelines, yet follows a 1986 Standard Evaluation Procedure. WSDA believes that the methodologies outlined in the 1998 Guidelines for Ecological Risk Assessment reflects a more current approach to the science of risk assessment, and is scientifically sound. Following these guidelines EPA would form the basis for a risk assessment that would satisfy both the FIFRA requirements as well as the ESA requirements. If this interagency effort is to be meaningful, these risk assessments would serve the dual role of satisfying both FIFRA pesticide registration requirements and at least informal consultation requirements under the ESA. EPA's approach to assessing risks should be tailored toward meeting the requirements of both statutes.
- An important and integral part of the development of counterpart regulations is the joint agreement on the approach to assessing the risks to listed species in a way that will meet the requirements of both FIFRA and ESA. If that means that EPA needs to change its approach, then it must be done. The agencies must work cooperatively, however, to ensure that there is as little disruption in current processes as possible.

### *Data Quality*

- FIFRA data requirements should be reviewed by the three agencies, and modified where necessary to use the FIFRA process to comply with the ESA. Because the Services are responsible for administering the ESA, they must be satisfied that the EPA risk assessment under FIFRA also considers factors needed to comply with ESA. Investing EPA with initial risk assessments under ESA also requires concurrence of the Services. If formal consultation is necessary, it should be conducted by the Services.
- Second, EPA and the Services must agree on data requirements that serve both the needs of FIFRA pesticide registration and ESA species protection at the same time. The services are still ultimately responsible for administering the ESA, and they must be satisfied that EPA is capable of making "not likely to affect" decisions. This may require

compromise on the part of all the agencies on what data should be considered and how it should be considered in order to satisfy both statutes. Counterpart regulations will reflect that agreement and any compromises that occur.

- “Best scientific and commercial data available” should be defined as data that
  - Is empirical.
  - Is verifiable and replicable.
  - Has been peer reviewed.
  - Meets all quality assurance standards of the applicable agency.
  - For EPA, studies that have been conducted under Good Laboratory Practice standards.
  - Is obtained from reliable sources.
  - Is complete. Extensive searches must be conducted to determine what data is available, and all data must be considered in any decision.

*Public Participation: State Lead Agencies*

States should be encouraged to provide data for ESA consultations. Only by understanding the geo-spatial relationship between agricultural areas and endangered species habitat can an accurate exposure assessment be conducted and subsequently if needed, can mitigation be appropriately applied to relevant areas. WSDA believes that endangered species assessments done at the national scale without site-specific data will result in overly conservative estimates being used to assess exposure and mitigation measures being imposed upon areas where they are not needed.

*Emergency Exemptions (Section 18) and Special Local Needs (Section 24(c)) Registrations:*

Minor crop states, such as Washington rely heavily on Emergency Exemptions and Special Local Needs Registrations. It is important for states to continue to obtain Emergency Exemptions and Special Local Needs Registrations in a timely manner. Due to the time-sensitive nature of these activities, WSDA has developed an ESA review process to ensure that potential impacts to listed species are evaluated and addressed prior to submittal to the EPA. WSDA developed this type of review to provide a programmatic approach to ESA evaluations that may not be doable by the EPA in the time-frame required for use in Washington State.

Thank you again for the opportunity to comment on the Advance Notice of Proposed Rulemaking to promulgate counterpart regulations under the Endangered Species Act. If there is a need for future information or clarification please contact Bridget Moran at 360.902.1936 or [bmoran@agr.wa.gov](mailto:bmoran@agr.wa.gov).

Sincerely,  
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